IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 295 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

---

SHAH HARSHADBHAI VITTHALDAS ALIAS MOTILAL

Versus

JASHODABEN D/O SHAH CHHOTALAL RANCHHODDAS

---

Appearance:

MR AJ PATEL for Petitioner

MR KM DARJI for Respondent No. 1

---

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/04/2000

ORAL JUDGEMENT

The petitioner has filed this Revision Application challenging the judgment and orders recorded by the two courts below under Section 115 of the Code of Civil Procedure, 1908. Petitioner was the plaintiff before the Civil Court at Petlad being Civil Suit

No.157/99. There he claimed that the respondent was attempting to raise construction and the said construction was likely to infringe the right of light and air of the petitioner. Therefore, the said construction was put to challenge. The interim application was made preventing the respondent from raising construction at the said place. After hearing the parties, the trial court dismissed application for interim relief by order dated 10.1.2000. The petitioner carried the matter before the District Court by filing Civil Misc.Appeal No.10/2000. Therefore, the petitioner took the same contention but the said appeal was dismissed by the third Joint District Judge, Kheda by judgment and order dated 27.2.2000.

2. Feeling aggrieved by the said judgment and order passed by the District Judge, the petitioner has preferred this Revision Application. It has been mainly contended here that the two courts below have wrongly given weight to the previous litigation and the right of the petitioner with respect to the right of light and air which has been acquired by the petitioner and that fact has been overlooked and ignored by the courts below. That the previous orders and judgments have been incorrectly interpreted by the two courts below and, therefore, the orders of the two courts below are illegal and they have committed material irregularity and, therefore, they are required to be quashed and set aside. The petitioner, therefore, prays that the present Revision be allowed and the judgments and orders of the two courts below be set aside, the interim application Exh.5 presented to the Civil Court by the petitioner be allowed and the respondent be prevented from raising any construction at the disputed place pending hearing and disposal of the suit before the Civil Court.

3. I have heard Mr K M Darji, learned Advocate who appeared on caveate and learned Advocate Mr A J Patel, for the petitioner and have perused the papers. I have also gone through the judgments and orders in the previous litigation of 1939-40.

4. The two courts below have observed that there was previous litigation between the parties in 1936-37 and 1939-40 and yet the petitioner has not stated the said fact and, therefore, there is suppression of material facts. Mr A J Patel, learned Advocate for the petitioner submits that the litigation was contested by the father of the petitioner and, therefore, the petitioner was not aware of the said position. Therefore, there was no question of intentional omission and that this fact

should not be viewed against the petitioner. Let us take it that the said litigation of 1937-38 and onward was not within the notice or knowledge of the petitioner. However, the fact remains that the right of light and air of the petitioner was the subject matter of challenge in the said matter. At the initial stage the Civil Court at Petlad was required to entertain suit No.462 of 37-38. Issues have been framed and it is very clear that the right of light and air was the subject matter of the issues and the suit was dismissed. The matter was carried in appeal being Appeal No.37 of 39-40 and the appeal was also dismissed. There was also specific issue with respect to the right of light and air of the petitioner and the Appellate Court has found that the Civil Court has not committed error in holding that the petitioner had not acquired the right of light and air.

5. Records of Second Appeal No.336 of 29/40 also show that on 25.7.1941 the appeal of the father of the petitioner was dismissed. Learned Advocate for the petitioner invited my attention to para 4 of the said judgment in the said Second Appeal. There, it has been observed that whatever observations made by the courts below may be treated as cancelled without affecting the rights of the parties. On the strength of tghe said observation, learned Advocate for the petitioner asserts that the previous decision does not come in the way of the petitioner claiming the right of light and air in the present suit. On a perusal of the previous judgment, it can be gathered that there was a specific mention in Appeal No.37 of 39-40 that the right of light and air had not been acquired by the father of the petitioner. It appears that the prescriptive period has not been concluded and therefore, the right could not be acquird by the father of the petitioner. Mr A J Patel, learned Advocate for the petitioner asserts that the said decision was rendered in 1940 and 60 years have gone thereafter and there is no obstruction to right of light and air and therefore, the petitioner has acquired the right of light and air. It is true that Section 15 of the Easement Act prescribes that the right can be acquired if it has been put to use for a period of 20 years or more without interruption for the said period, the right must have been enjoyed as of right without any obstruction and for a continuous period of 20 years. However, at the same time, when the right was not acquired, litigation was filed and, there it was positively held that the right had not been cleared as prescriptive period was not over. Once the claim has been challenged and that has been done before the completion of the prescriptive period then, in my view,

the respondent was not required to continuously obstruct the said right of the petitioner. In other words, once the alleged right was obstructed within the prescribed period and it was not thereafter obstructed for a long time after the judgment of the courts below, then it cannot be said that the petitioners would get fresh right of easement of light and air. Otherwise, it would mean that there should be continuous obstruction even after the judgment of the three courts. Under the circumstances, when the previous judgment made it clear that the petitioner had not acquired the right of light and air and when the said decision was confirmed by two superior courts competent to decide the said issue and even if it is assumed that there was no obstruction whatsoever, I am of the view that the petitioner would not get fresh right of light and air on account of the aforesaid thre judgments of the competent court.

6. Learned Advocate for the respondent has also made it clear that the respondent does not proceed to raise new construction altogether. It is his submision that the construction was there but it was in a bad condition and it was required to be removed and new construction was required to be raised at the same place. So according to the case of the respondent it is only a substitution of the original construction. In that view of the matter, it cannot be said that prima facie case is in favour of the petitioner for getting the interim relief when the whole construction was there which is going to be substituted by a new one.

7. Apart from the above position, the two courts below have recorded concurrent finding that there was no obstruction to light and air. Both the courts had jurisdiction to decide those issues under Order 39 Rule 2 of the Code of Civil Procedure. In my view, the orders are discretionary and when they are passed considering the previous judgments as aforesaid, it cannot be said that the two courts below had no jurisdiction to entertain the matters. It can also not be said that the two courts below have committed material irregularity relating to jurisdiction and, therefore, I do not find this to be a fit case for interference in this Civil Revision Application. This Civil Revision Application is accordingly ordered to be dismissed with cost of the respondent.

....
msp.